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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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AZ CORP COMMISSION
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IN THE MATTER OF U S WEST
COMMUNICATIONS, INC.'S COMPLIANCE
WITH SECTION 271 OF THE
TELECOMMUNICATIONS ACT OF 1996.

Docket No. T-00000A-97-0238

IN THE MATTER OF QWEST
CORPORATION'S COMPLIANCE WITH
SECTION 252(e) OF THE
TELECOMMUNICATIONS ACT OF 1996.

Docket No. RT-00000F-02-0271

ARIZONA CORPORATION COMMISSION,

Docket No. T-01051B-02-0871

Complainant.

v.

QWEST CORPORATION,

Respondent.

REPLY BRIEF OF THE
RESIDENTIAL UTILITY CONSUMER OFFICE

INTRODUCTION

The Residential Utility Consumer Office ("RUCO") replies to Qwest Corporation's Initial Post Hearing Brief ("Qwest's Brief") and the Arizona Corporation Commission Staff's ("Staff") Post Hearing Brief as follows. In this Brief, RUCO only replies to the arguments raised by Qwest and Staff in their Opening Briefs and RUCO does not waive any other argument and/or recommendation that it made in its Opening Brief (See Conclusion).

1 **THE PROPOSED CASH PAYMENT WILL NOT BE A DETERRENT TO QWEST**

2 Qwest is critical of what it interprets as RUCO's argument concerning the
3 insufficiency of the penalty amount. Qwest's Brief at 7. Qwest claims that measuring its
4 total revenues, as opposed to Arizona revenues, provides an inappropriate context for
5 measuring the potential impact of the financial penalty. Id. According to Qwest, since the
6 litigation addressed the effects of Qwest's conduct in Arizona, the proper comparison is to
7 Qwest's intrastate earnings.

8 Qwest misses the point. RUCO made the argument to point out that a "purely
9 financial penalty", without findings, would do little to deter future misconduct. The fact that
10 the amount being considered represents such a small percentage of Qwest's total revenue
11 further underscores the argument.

12 In that context, as well as any other, Qwest's argument that only its intrastate
13 operations should be considered is even further misplaced.¹ The illegal conduct in
14 question involved Qwest's operations in its entire operating region, not just Arizona. The
15 goal should be to deter Qwest from such conduct on both a regional and state level since,
16 in either case, Arizona will be directly negatively affected as it was by the 252 and 271
17 proceedings. Moreover, the potential impact of the remedies in question should be on the
18 Company as a whole, not just its Arizona operations. The best deterrent from future
19 misconduct would include findings of wrongdoing.

20 **A FINDING OF WRONGDOING IS NECESSARY IN THIS CASE**

21 Qwest believes that a finding of wrongdoing in the Order approving the Agreement
22 is neither necessary nor proper. Qwest's Brief at 37. Qwest notes that in addition to the
23
24

1 financial penalties, the Agreement contains numerous forward-looking, non-economic
2 provisions that are designed to ensure compliance. Qwest's Brief at 37. Staff also
3 acknowledges these other provisions of the Agreement, noting that Sections 8, 9, 12, 13,
4 14, 15 and 16 all contain measures designed to ensure that Qwest does not engage in the
5 same type of conduct in the future. S-1 at 11. Of those Sections, only Section 8
6 (Retention of an Independent Monitor) and Section 9 (Compliance Training) address the
7 252 and 271 sub-docket.

8 RUCO is pleased that the Agreement provides for some type of future monitoring.
9 Unfortunately, the reality is that the retention of an independent monitor and compliance
10 training is likely to do very little to deter Qwest, especially if Qwest stands to profit from its
11 misconduct by millions of dollars. There is no better example than the 252 case. Qwest's
12 scheme was very sophisticated with very little risk of detection. It was a fluke that Qwest
13 was caught and the successful investigation of Qwest's scheme required the intricate
14 knowledge of an industry insider to figure out what was happening. (See 252 hearing,
15 Direct Testimony of Clay Deanhardt, R-1B, Transcript, March 19, 2003 at 591-617). As a
16 measure of the complexity of Qwest's scheme, even after the facts came to light, it took
17 Staff months to publicly acknowledge that the Company's acts were deliberate and
18 intentional. If Qwest attempts this conduct again, it is unlikely it will get caught because it
19 is unlikely that it's misconduct will be revealed during an annual review conducted by an
20 independent third-party monitor or as the result of Qwest's Compliance Training Program².

22 ¹ It appears, at least, that Qwest is willing to admit that a comparison to its intrastate operations is
23 appropriate.

24 ² In the unlikely event that the monitor discovers the conduct, Qwest would have already engaged in it for up
to one year.

1 Qwest posits that RUCO has failed to meet its burden that Qwest will not be
2 deterred by the large penalties. Qwest's Brief at 38. In support, Qwest misstates RUCO's
3 Director, Stephen Ahearn's testimony noting he "...admittingly failed to take into account
4 the fact that, although Qwest had previously paid substantial service tariff penalties in
5 1996, Qwest had not paid such penalties in 2002." Qwest's Brief at 38. Mr. Ahearn
6 agreed that Qwest paid \$1.6 million in service tariff penalties in 1996. Transcript, Volume
7 II at 460. Mr. Ahearn further testified that since 1996, Qwest paid the Commission over
8 \$4.5 million in service tariff penalties. Id., RUCO-1 at 7. That included the years of 1996-
9 2002. Transcript, Volume II at 481. RUCO applauds Qwest's progress in 2002. However,
10 that progress cannot be viewed in a vacuum. The Commission should consider the
11 penalties for each year³ and the total.

12 Qwest next argues that its express notice and acknowledgement of the
13 Commission's contempt powers in the Agreement are designed to ensure compliance.
14 Qwest's Brief at 37. The Agreement provides for, among other things, an avowal by
15 Qwest that it will not engage in fraudulent, deceptive or intentionally unlawful conduct
16 before the Commission. J-1 at 2. Qwest apparently believes that its avowals to obey the
17 law imposes "clear requirements" punishable by contempt. Qwest's Brief at 38. Ironically,
18 Qwest presents the very argument that demonstrates why a finding of wrongdoing is
19 necessary in this case.

20 Qwest claims that contempt cannot be based on a vague, non-specific requirement.
21 Id. In Qwest's view, an avowal by the Company to not engage in unlawful conduct would
22 place the Commission in a better position to enforce its contempt powers should Qwest
23

24 ³ These figures are a matter of public record on file with the Commission.

1 violate the law. Qwest's argument is flawed – the proscription of conduct which violates
2 specific statutes is clearly a less vague, more specific requirement than an avowal to not
3 engage in "fraudulent, deceptive or intentionally unlawful conduct."

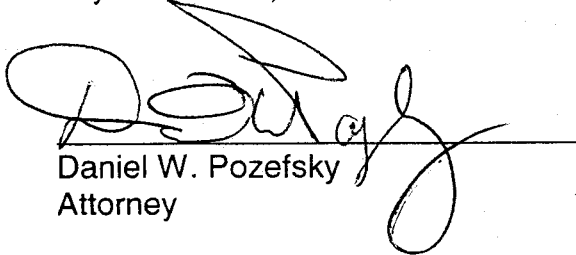
4 Moreover, an order by the Commission proscribing illegal conduct described by
5 specific statute is narrow enough to meet the standard required for a contempt finding.
6 The Commission's own practice in enforcing the Securities Act demonstrates that
7 proscribing conduct by reference to specific statutes is a sufficiently clear order. The
8 Commission routinely issues Cease and Desist Orders that order respondents to cease
9 violating specific statutes. RUCO suggests that the Commission adopt an order in the
10 same manner as the Cease and Desist Orders used in Securities cases. RUCO suggests
11 that any order approving the Settlement Agreement include Conclusions of Law finding
12 that Qwest's failure to file interconnection agreements between Qwest and McLeod and
13 Qwest and Eschelon violated 47 U.S.C. § 252(e) and A.A.C. R-14-2-1112, that Qwest
14 engaged in a practice of discriminatory conduct in violation of A.R.S. § 40-203, and that
15 Qwest engaged in a scheme to defraud the Commission in violation of A.R.S. §§ 13-2310,
16 13-2311 and 40-203. In addition, RUCO recommends that the Commission specifically
17 order Qwest to cease engaging in discriminatory conduct and cease scheming to defraud
18 the Commission.

19 **CONCLUSION**

20 The approval of the Settlement as proposed would not be in the public interest. The
21 Commission should adopt the Settlement with modifications. First, the Commission should
22 make findings that Qwest's conduct was discriminatory and illegal. Second, the
23 Commission should make findings that Eschelon and McLeod engaged in a scheme with
24

1 Qwest to defraud this Commission, the public and other CLECs. Finally, Qwest should not
2 be able to earn a return on its "voluntary contributions".

3 RESPECTFULLY SUBMITTED this 29th day of October, 2003.

4 
5
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